Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Policies and Rules Pertaining to the Regulation of Cellular Carriers	)	RM No. 8179
	)	

COMMENTS OF BELLSOUTH

BellSouth Corporation, BellSouth Telecommunications, Inc. and BellSouth Enterprises, Inc. (collectively "BellSouth") [1/] hereby submit their comments in support of the Request for Declaratory Ruling and Petition for Rulemaking filed by the Cellular Telecommunications Industry Association on January 29, 1993 ("CTIA Petition"). [2/]

I. INTRODUCTION

The CTIA Petition seeks much-needed regulatory relief and guidance for the cellular industry following the decision of the United States Court of Appeals for the District of Columbia Circuit in AT&T v. FCC. [3/] In that decision, the court invalidated the Commission's decade-old permissive detariffing scheme, a policy which relieved common carriers designated as "nondominant" (i.e., those lacking in market

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1/ Through its subsidiaries, BellSouth operates over 70 cellular systems in various MSAs and RSAs.

2/ The Commission issued a Public Notice on February 17, 1993 requesting comment on the CTIA Petition.

3/ AT&T v. FCC, No. 92-1053, slip. op. (D.C. Cir. Nov. 13, 1992).

power) of the obligation to file federal tariffs for their interstate services. [4/] Based on a strict reading of Section 203(a) of the Communications Act of 1934, as amended ("Act"), which states that "every" common carrier "shall" file its schedule of charges with the Commission, the court concluded that the Commission had exceeded its statutory authority in adopting a policy which allowed for the wholesale abandonment of federal tariffing obligations by nondominant carriers.

The court's decision has left the cellular industry in a unique position. While streamlined tariff filing procedures have been established for nondominant carriers (with additional streamlining proposed for such carriers), [5/] the Commission has not had occasion to address whether cellular carriers should be deemed nondominant. Nonetheless, such carriers have never been required to file federal tariffs because their services are essentially intrastate in nature and thus beyond the scope of the Commission's tariffing authority pursuant to Sections 152(b) and 221(b)

[4/] The permissive detariffing policy was adopted in the Competitive Carrier proceeding. See Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor (CC Docket No. 79-252), Notice of Inquiry and Proposed Rulemaking, 77 FCC 2d 308 (1979)("Competitive Carrier"); First Report and Order, 85 FCC 2d 1 (1980); Further Notice of Proposed Rulemaking, 84 FCC 2d 445 (1981); Second Report and Order, 91 FCC 2d 59 (1982), recon., 93 FCC 2d 54 (1983); Second Further

of the Act. [6/] Accordingly, insofar as AT&T v. FCC may be interpreted to impose a federal tariffing requirement on cellular carriers, there is now a pressing need for the Commission to confer nondominant status on the cellular industry, and CTIA's Petition requests that the Commission remedy this problem. To further simplify the tariff filing process for cellular carriers, CTIA also asks the Commission to adopt a

The Commission's rules define "nondominant carriers" as those "not found to be dominant." [8/] In other words, nondominant carriers are carriers that are unable to exercise "market power (i.e., power to control price)." [9/]

Cellular carriers are now considered dominant, but not on the basis of any finding that they are in a position to exercise market power. Rather, cellular's dominant status is attributable to the fact that the Commission has never been called upon to address the cellular industry in this context. [10/]

CTIA's Petition makes a compelling showing that competition in the cellular industry has been, and continues to be, vigorous such that cellular carriers are clearly in no position to exercise market power. This competition has triggered an explosive growth in subscribership. According to figures recently released by CTIA, there were 3.5 million new cellular subscribers in 1992, bringing the total subscribership figure past the 11 million mark. Of the new subscribers, 2.1 million

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8/ 47 C.F.R. § 61.2(t).

9/ First Report and Order, 85 FCC 2d at 10.

10/ In this regard, the Commission noted in the Fourth Report and Order that the cellular industry was "[a]mong the classes of carriers not heretofore considered in this rulemaking," 95 FCC 2d at 582 (1983), and cellular carriers remained subject to dominant regulation after the Fifth Report and Order because the Commission had "not yet examined the market power of such carriers." 98 FCC 2d at 1204 n.41 (1984). The Commission recently reiterated that "cellular's status as an interstate dominant carrier is obscured by the absence of any direct examination of the competitiveness of cellular service in the interstate communications market", Cellular Telecommunications Industry Association Petition for Waiver of Part 61 of the Commission's Rules, Order, DA 93-196 (Released Feb. 19, 1993) at ¶ 5, and the conclusion that cellular carriers are dominant is not based "on any market analysis." Id. In view of the fact that the Commission has never performed the analysis needed for a finding of dominance, the application of Section 61.2(t) of the rules leads to the conclusion that cellular carriers have always been in fact, nondominant.

signed up in the last six months alone, substantially surpassing the record for any prior 6-month period." [11/]

Moreover, the Commission has concluded that "facilities-based carriers within each market compete not only against each other, both directly and through agents, but also with numerous resellers", [12/] and that "facilities-based carriers are competing on the basis of market share, technology, service offerings, and service price." [13/] In addition, two federal courts have held that facilities-based carriers do not possess monopoly power (even during the headstart period). [14/] It is also noteworthy that cellular carriers are only marginally engaged in interstate activities, [15/] and most of that activity involves the resale of other carriers' services. These incontestable facts strongly support CTIA's request that cellular carriers be classified as nondominant.

11/ See Communications Daily, March 3, 1993, at 8.

12/ Bundling of Cellular Customer Premises Equipment and Cellular Service, 7 FCC Rcd 4028, 4029 (1992).

13/ Id.

14/ Metro Mobile CTS, Inc. v. NewVector Communications, Inc., 892 F.2d 62 (9th Cir. 1989); Metro Mobile CTS, Inc. v. NewVector Communications, Inc., 661 F. Supp. 1504 (D. Ariz. 1987).

15/ CTIA Petition at 19-20. In this connection, BellSouth agrees with CTIA's position that traditional roaming services -- where a roamer customer from a different state places calls on the host carrier's system in the same manner as the host carrier's own customers -- are not subject to any federal tariffing requirements that would not otherwise apply to services offered the host system's own customers. CTIA Petition at 14-15.

2. Banded Rates

In its Petition, CTIA requests that the Commission adopt a rule allowing the submittal of "banded rate" tariffs. [16/] Under this concept, a carrier would specify maximum and minimum rates for a particular service.

BellSouth submits that the Commission has ample authority to permit the filing of tariffs with banded rates. The tariff requirement of Section 203 of the Act and other provisions of Title II share a common heritage with the corresponding provisions of the Natural Gas Act, in that both are derived from the Interstate Commerce Act. Accordingly, the courts have found that the FCC's range of flexibility in carrying out the requirements of Section 203 is equivalent to that of the Federal Energy Regulatory Commission (FERC)(or its predecessor, the Federal Power Commission) in implementing the requirements of Sections 4 and 5 of the Natural Gas Act. [17/] The Second Circuit, noting that "Section 4(d) of the Natural Gas Act . . . is similar to Section 203 of the Communications Act," [18/] held that the Commission's discretion in implementing Section 203 was parallel to that of the FPC in implementing equivalent language used in Section 4(d) of the Natural Gas Act. [19/]

That being the case, it is highly relevant that the D.C. Circuit has specifically approved FERC's decision to "establish[ ] a system of flexible rates" in

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16/ CTIA Petition at 23.

17/ 15 U.S.C. §§ 717c, 717d.

18/ AT&T v. FCC, 487 F.2d 864, 8977 n.27 (2d Cir. 1973); see also id. at 879-80 nn.29-32.

19/ Id. at 879. See also AT&T v. FCC, 503 F.2d 612, 617-18 (2d Cir. 1974)(FCC has greater latitude than FPC where language in the two statutes differ).

Associated Gas Distributors v. FERC, 824 F.2d 981, 1007 (D.C.Cir. 1987), cert.denied.

> For much the same reasons that courts allow administrative agencies the leeway to choose between rulemaking and adjudication , . . . we think that the Commission was within its power to allow pipelines a parallel choice. But, just as courts insist on a degree of agency consistency, . . . we expect that the Commission will exact from the pipelines as much consistency of application as is necessary for both to be in conformity with §§ 4 and 5. [24/]

Under these circumstances, the Commission clearly has the power to establish rules permitting cellular carriers to file tariffs stating maximum and minimum rates. A carrier filing such rates would then be free to charge customers various rates falling within the band so established, based on competitive circumstances, without violating the filed rate doctrine. [25/]

24/ Id. at 1010.

25/ Carriers would still be subject to the provisions of Section 202(a), which prohibits "unjust or unreasonable discrimination in charges" and the granting of "undue or unreasonable preference or advantage." However, the court found in the Associated Gas case that market conditions, including customer access to substitutes, may provide an adequate justification for selective discounting in particular cases. 824 F.2d at 1010-1012.

CONCLUSION

For the foregoing reasons, the Commission should confer nondominant status on the cellular industry, and grant the other relief requested by CTIA.

Respectfully submitted,

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March 19, 1993

CERTIFICATE OF SERVICE

I, David G. Richards, hereby certify that I have on this 19th day of March, 1993, served a true copy of the foregoing "Comments" on the following:

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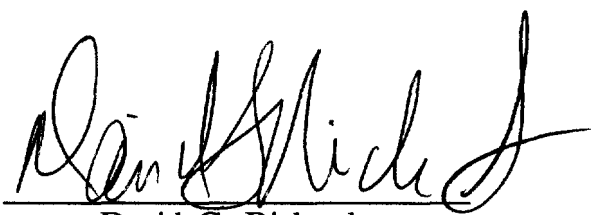

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